

NO. 82-1920

IN THE
UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

STATE OF ALABAMA

Petitioner,

—vs—

WILLIAM R. GORDON, JUDGE, CIRCUIT COURT
OF MONTGOMERY COUNTY
(WILLIAM SANFORD ELEY, II,
REAL PARTY IN INTEREST),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
ALABAMA SUPREME COURT, THE ALABAMA COURT
OF CRIMINAL APPEALS AND THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the State's Petition for Certiorari is due to be denied.

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I. STATEMENT OF THE CASE

On April 2, 1982, the Montgomery County Grand Jury returned a "True Bill" indicting the Respondent, William Sanford Eley, II, of assault in the first degree. He filed a "Plea of Not Guilty and Waiver of Arraignment" on April 21, 1982. Eight days later, Eley filed a "Plea of Autrefois Convict", which was denied by the Respondent, Judge William R. Gordon, after oral argument, on June 15, 1982.

On June 24, 1982, Eley filed a "Plea of Former Jeopardy", which was later briefed and argued orally both by his counsel and by counsel for the Petitioner, the State of Alabama. Judge Gordon granted the same on September 1, 1982 thereby dismissing the indictment, *as framed*. (Petitioner's Appendix 1-33). The State filed its Notice of Appeal on September 7, 1982, under Senate Bill 60's purported grant to the State of the right to appeal from such a *pretrial* order dismissing an indictment on double jeopardy grounds.

On October 20, 1982, after both Eley and the State had submitted briefs and made oral argument, the Alabama Court of Criminal Appeals granted Eley's Motion to Dismiss the State's appeal inasmuch as Senate Bill 60 was found to have been "pocket vetoed" by then Governor Fob James. The Alabama Supreme Court subsequently denied certiorari on December 17, 1982. *State v. Eley*, 423 So.2d 303 (Ala. Cr. App.), *cert. denied*, 423 So.2d 305 (Ala. 1982).

The State, on January 5, 1983, filed a Petition for a Writ of Mandamus in the Alabama Court of Criminal Appeals thereby seeking, by *subterfuge*, to obtain review, on the merits, of Judge Gordon's pretrial order dismissing its indictment on double jeopardy grounds. Five days later, the Alabama Court of Criminal Appeals denied the State's Petition for a Writ of Mandamus. (Petitioner's Appendix 34). The State's Application for Rehearing

and Request for the Finding of Additional Facts, both filed January 20, 1983, were also denied by that Court four days later. (Petitioner's Appendix 35). From this denial, the State filed a Petition for a Writ of Certiorari to the Alabama Supreme Court on February 7, 1983, which was also denied on April 8, 1983. (Petitioner's Appendix 36-37). Finally, on or about May 25, 1983, the State filed its instant Petition for a Writ of Certiorari in this Court.

II. STATEMENT OF THE FACTS

The Respondents incorporate by reference the last paragraph of their Statement of the Case set forth immediately above as if the same were set forth fully herein.

III. SUMMARY OF THE ARGUMENT

The Petitioner admittedly now seeks review on certiorari from the State courts' denial of its Petition for Mandamus. This decision was based solely on State law without any consideration whatsoever given to the double jeopardy issue the Petitioner erroneously contends is now before this Court. Since no federal question was ever involved, much less one of a substantial nature, then certiorari review is not proper.

In any event, since the State has no right of appeal from Judge Gordon's decision and the double jeopardy issue could not have been considered and was not considered through a mandamus subterfuge by any other Alabama court, then Judge Gordon's pre-trial order dismissing the indictment on double jeopardy grounds was the decision from the highest court in which a decision could be had on this issue. Such decision, by its very nature, was interlocutory in character and did not constitute a final judgment necessary for review by certiorari.

Finally, since Judge Gordon's decision is from the highest state court in which a decision could be had on the double jeopardy

issue, then the State's time within which to seek review by certiorari began to run from the date of said pretrial order and the filing herein was thus not done in a timely manner.

IV. THE STATE'S PETITION FOR CERTIORARI IS DUE TO BE DENIED

A. The Petitioner Is Seeking Review Of A Decision Based Solely On State Law

The State admits at pages twelve and thirteen of its Petition, as the following statement quoted from the bottom of page one of its June 3, 1983 letter to the Clerk of this Court further indicates, that "This action seeks review of the State courts' disposition of a *mandamus* proceeding in which Judge Gordon was the Respondent Judge." (emphasis added).

The State's Petition for Mandamus was evaluated *only* under established Alabama precedent regarding the granting of such writs, and it was found to be lacking merit since Judge Gordon's pretrial order dismissing the indictment on double jeopardy grounds was an affirmative action not outside the scope of his power, *Ex parte Nice*, 407 So.2d 874, 878, 882 (Ala. 1981), and not an abuse of his discretion. *State v. Cannon*, 369 So.2d 32, 33 (Ala. 1979). The double jeopardy issue was not even considered since mandamus is not "a substitute for appeal" under Alabama law. *Id.*

Just as it did below in its attempt to use mandamus as a subterfuge to remedy its lack of a right to appeal, the State, in its zeal to pursue the prosecution of Eley, has once again committed a most serious and costly procedural error. By admittedly now seeking review of *only* the mandamus denial, the State is petitioning this Court to review a decision based *solely* on State law, which did not even involve a federal question, much less one of a substantial nature as required by Rule 17(1) (c) of this Court's Rules. Such review is also not permitted under the jurisdictional basis,

28 U.S.C. §1257(3), cited by the State at page three of its Petition. See *New York Times v. Jascavich*, 439 U.S. 1317, 1318, 58 L.Ed.2d 25, 28, 99 S.Ct. 6, — (1978); *Duncan v. Tennessee*, 405 U.S. 127, 127, 31 L.Ed.2d 86, 87, 92 S.Ct. 785, — (1972); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 73-74, 99 L.Ed. 897, 901, 75 S.Ct. 614, — (1954); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S.Ct. 252, — (1950); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47, 80 L.Ed. 688, 710-11, 56 S.Ct. 466, — (1936).

B. The Petitioner Is Not Seeking Review Of A Final Judgment

The jurisdictional basis, 28 U.S.C. §1257(3,) cited by the State at page three of its Petition not only mandates that the decision sought to be reviewed by certiorari herein must have been rendered by *the highest court in which a decision could be had* but it also requires that such decision be *a final judgment or decree*.

Inasmuch as both the Alabama Court of Criminal Appeals and the Alabama Supreme Court concluded that then Governor Fob James had "pocket vetoed" Senate Bill 60 thereby leaving the State without a right of appeal from Judge Gordon's decision, *supra* at 1, and inasmuch as both the Alabama Court of Criminal Appeals and the Alabama Supreme Court could not and did not consider the double jeopardy issue during their respective analyses of the State's mandamus subterfuge, *supra* at 3-4, then the *highest court* from which a *judgment* on the *double jeopardy issue* could be had was that of the *trial court*, i.e., Judge Gordon. See C. WRIGHT, FEDERAL COURTS, § 107 at 537 (3rd ed. 1976).

However, Judge Gordon's decision (Petitioner's Appendix 1-33) was a *pretrial* order dismissing the indictment, *as framed*, on double jeopardy grounds. It was *without prejudice* to the State's right to *reindict* Eley under a new and properly framed

indictment and to thereby *continue its prosecution* of him on the assault charge. This pretrial order was therefore merely *interlocutory* in character, See *Ala. Code* (1975) §15-8-131, and by no means constituted a final judgment or decree necessary for review by certiorari. See *New York Times v. Jascavich*, 439 U.S. 1317, 1318, 58 L.Ed.2d 25, 28, 99 S.Ct. 6, ——— (1978); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S. Ct. 252, ——— (1950).

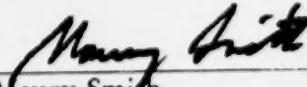
C. The Petitioner Is Not Seeking Review In A Timely Manner

Inasmuch as Judge Gordon's pretrial order dismissing the indictment was rendered by the highest court in which a decision could be had on the double jeopardy issue thus making it the State court of last resort on this question in this criminal proceeding, *supra* at 4-5, and inasmuch as said pretrial order was issued September 1, 1982 and inasmuch as the State filed its instant Petition for a Writ of Certiorari on or about May 25, 1983, then the State failed to file its Petition in a timely manner. See 28 U.S.C. §2101(d) and Rule 20(1) of this Court's Rules. In order to have filed in a timely manner, the State would have had to have done so within sixty days after September 1, 1982. Instead, the State filed its Instant Petition nearly nine months later. Review by certiorari has therefore been sought too late. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18, 94 L.Ed. 562, 565-66, 70 S.Ct. 252, ——— (1950).

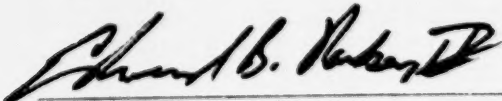
V. CONCLUSION

For the reasons stated hereinabove, the State's Petition for Certiorari is due to be denied.

Respectfully submitted,



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Respondents



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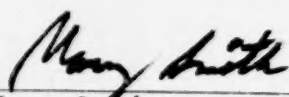
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CERTIFICATE OF SERVICE

I, Maury Smith, as a member of the Bar of the United States Supreme Court and as the Counsel of Record for the Respondents herein, do hereby certify that on this the 24th day of June, 1983, I served three (3) printed copies of the foregoing on the Petitioner's Counsel of Record, Charles A. Graddick, Esq., and Joseph G. L. Marston, III, Esq., by mailing same to them, first class postage prepaid and addressed as follows:

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